STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT, Respondent.	Case 124 No. 46240 MP-2522 Decision No. 27064-B
RACINE UNIFIED SCHOOL DISTRICT, Complainant, vs. RACINE EDUCATION ASSOCIATION, Respondent.	Case 125 No. 46411 MP-2533 Decision No. 27079-B

Appearances:
Mr. Robert K. Weber, Hanson, Gasiorkiewicz & Weber, S.C., Attorneys at Law, 5
Ms. JoAnn M. Hart, Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, 119 Ma

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On September 12, 1991, the Racine Education Association filed a complaint with the Wisconsin Employment Relations Commission alleging that the Racine Unified School District violated Secs. 111.70(2) and 111.70(3)(a)4 and 5 of the Municipal Employment Relations Act. The Commission subsequently appointed Karen J. Mawhinney as Examiner to conduct hearing and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07, Stats. On October 15, 1991, the Racine Unified School District filed a complaint with the WERC alleging that the Racine Education Association violated Sec. 111.70(3)(b)4 of MERA, and on the same date, filed a Motion to Consolidate Proceedings. On November 8, 1991, the Commission ordered that the Complaints be consolidated for the purposes of hearing and decision. A hearing was held in Racine, Wisconsin, on February 18, 1992, and the parties completed their briefing schedule by May 27, 1992.

FINDINGS OF FACT

1. The Racine Education Association, called the Association herein, is a labor organization with its offices at 704 Grand Avenue, Racine, WI 53403.

2. The Racine Unified School District, called the District herein, is a municipal employer with its offices at 2220 Northwestern Avenue, Racine, WI 53404.

3. The Association and the District have been parties to a series of collective bargaining agreements, the most recent of which is the 1990-1992 agreement, which contains the following grievance procedure:

9 GRIEVANCE PROCEDURE

. . .

9.2The purpose of Grievance Procedure

The purpose of this procedure is to secure equitable solutions to the problems which from time to time arise, affecting the welfare or working conditions of teachers.

9.3 Processing of Grievances

Grievances of teachers will be considered and processed in the following manner:

9.3.1 Level One -- Principal, Supervisor or Assistant Superintendent

9.3.1.1 Informal Discussion

A teacher who believes he/she has cause for a grievance will orally discuss the matter with his/her principal or supervisor with the objective of resolving the matter informally at the lowest possible administrative level. In appropriate cases, the assistant superintendent will be the Level One administrative person to be contacted. If there is a failure to resolve the matter informally, the aggrieved teacher may present his/her grievance in writing to the same person such was discussed with orally, either directly or through the Association's designated representative.

9.3.1.2 Group/Class Grievance (Level One)

The Association's designated representative may submit in writing directly to the building principal or appropriate assistant superintendent a grievance affecting a group or class of teachers in that school.

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9.3.2 Level Two -- Board or Subcommittee of Board

9.3.2.1 Written Grievance

If no satisfactory decision has been rendered within fifteen (15) school days after the teacher presented the written grievance in Level One, the aggrieved teacher may within five (5) school days thereafter file a written grievance with the Association's

designated representative.

9.3.2.3 Referral to Board

Within five (5) school days after receiving the written grievance, the Association's designee will refer it to the Superintendent of Schools for submission to the Board or Subcommittee of the Board.

9.3.2.3 Board Hearing

Within twenty (20) school days after the Superintendent has received the written grievance, the Board or Subcommittee of the Board will meet with the aggrieved teacher and the Association representative for the purpose of resolving the grievance.

9.3.3 Level Three -- Arbitration

9.3.3.1 Teacher Notification to Association for Appeal

If no satisfactory decision has been rendered within ten (10) school days after the first meeting with the Board, the aggrieved teacher may, within five (5) school days thereafter, request in writing that the Association's designee appeal his/her grievance to arbitration.

9.3.3.2 Association Notification to Board of Appeal

If the Association decides the grievance is meritorious, it may within twenty (20) school days appeal the grievance to arbitration by notifying the Board in writing of such appeal.

9.3.3.3 Selecting an Arbitrator

The arbitrator will be agreed upon by the Superintendent or his/her designee and the Association. If there is a failure to agree on an arbitrator within ten (10) school days after the written notice of appeal, the Wisconsin Employment Relations Commission will be requested by either party to submit a list of five (5) persons suitable for selection as arbitrator. If the parties cannot agree to one person named on the list, the parties shall strike a name alternately, beginning with the Association, until one name remains. Such remaining person shall act as arbitrator. In subsequent selections, the parties shall alternate the first striking of a name.

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9.4 Group/Class Grievance (Level Two)

The Association's designee may submit in writing directly to the Board or Subcommittee of Board a grievance affecting a group or class of teachers in more than one school; such grievance shall begin process at Level Two. However, if the Association's designated representative does not present such a grievance in writing to the Board or subcommittee of the Board within twenty (20) school days after the event or condition occurred on which the complaint is based, any grievance respective to that matter shall be considered waived provided the designated representative knew, or should have known, of the event or condition.

. . .

4. In January of 1991, the Association filed three grievances at Level Two -- Grievance No.'s 48-91, 58-91, 55-91. The District claimed that the three grievances should have been filed at Level One instead of Level Two.

5. Grievance No. 48-91 contained the following information:

Grievant's Name: REA for Barbara DeLaney & Like Affected Teachers

School: District-wide TMH Community Based Teachers

Date filed at Level II: January 14, 1991 (per section 9.4 Group/Class Grievance (Level Two)

Date of occurrence: Continuing
Is Violation continuing? Yes X

Contract sections and/or District policies violated: Staff Utilization & Working Conditions sections 10.4 - 10.4.3

Describe in detail what happened: DeLaney and other TMH teachers have not been granted the benefits of the Agreement nor has the District made any efforts to grant Agreement benefits.

Names of all person(s) with knowledge of facts: Assistant Superintendent Staff Personnel Services Del Fritchen, Director of Special Education Donna LaPlante, Park Directing Principal Peter Alvino

Action requested to resolve this grievance: (1) Provide benefits of section 10.4. (2) Payment of one and one-half (1-1/2) times for loss of each lunch period. (3) Payment (per section 10.4.3) of one-fifth (1/5) for period and one-half of lost planning time.

How long has this condition existed? Continuing

Did you perform the order? N/A

Does this affect more than one Unified building? Yes X
Does this affect more than one person? Yes X

6. Grievance No. 58-91 contained the following information:

Grievant's Name: Racine Education Association

School: Giese, Wind Point & Like Affected District-wide

Date filed at Level II: January 22, 1991

Date of occurrence: Continuing
Is violation continuing? Yes X

Contract sections and/or District policies violated: Section 3 - Board Rights, Staff Utilization & Working Conditions section 10.6 - Maintenance of Facilities, Teacher Rights section 4.1 - Statutory/Constitutional Rights

Describe in detail what happened: Teachers in at least Giese and Wind Point schools have been forced to work in substandard conditions when the District has failed or refused to keep heating systems properly functioning. Room temperatures have been as low as 50 in classrooms for many hours and in some cases a full day.

Additionally, instead of closing the facility until the furnaces could deliver good and proper heating (and statutorily required reasonable temperatures), school was ordered on January 14, 1991 without notice to teachers or parents that there would be extremely cold rooms and for several hours the entire school.

The law provides for emergency release but the Marriot Company, District maintenance supervisors and District administration are "covering up" failed decisions by compelling students and teachers to work in unacceptable conditions.

Names of all person(s) with knowledge of facts: Marriot Company, District Maintenance Supervisors, Assistant Superintendent Ed Benter, Superintendent of Schools Don Woods

Action requested to resolve this grievance: (1) Full payment (without sick leave deduction) for teachers who went home or did not attend the day. (2) No sick leave deducted for ten (10) days after "cold" conditions. (3) Board policy requiring closing buildings with unhealthy or unsafe conditions.

How long has this condition existed? Winter 1990-91

Did you perform the order? Yes!

Does this affect more than one Unified building? Yes X

Does this affect more than one person? Yes X

A sheet attached to the above grievance stated:

> We, the undersigned, grieve the fact that we were subjected to unreasonable working conditions, i.e., improper heating in the rooms and school and were forced to have our students' health and well-being threatened. Any sickness caused by these working conditions should be paid by the District and in the future the Board should promulgate a policy that closes schools until proper heating is available.

The sheet was signed by 24 teachers at Giese School on January 15, 1991, and was prepared by a building representative. A similar list was not prepared for teachers at Wind Point School.

7. Grievance No. 55-91 contained the following information:

Grievant's Name: REA for Holly Jeffrey and All Like Affected

School: District-wide

Date filed at Level II: January 28, 1991 (per section 9.4 Group/Class Grievance (Level Two)

Date of occurrence: January 15, 1991
Is violation continuing? Yes X

Contract sections and/or District policies violated: Section 4 - Teacher Rights, Section 5 - Teacher Discipline Procedure, Section 8 - Board Rights, Board Policy 6144.36 - Parent Complaint Form

Describe in detail what happened: See Attachment

Names of all person(s) with knowledge of facts: Superintendent of Schools Dr. Woods, Assistant Superintendent Pupil Personnel Services Jetha Pinkston, Director of Guidance Donna Tartagni, Administrator Formative Evaluation K-8 Frank Osimitz, Gifford Principal Doug Julius, Gifford Asst. Principal Sue Miller, Director of Employee Relations Frank Johnson

Action requested to resolve this grievance:

1. Board will conduct the hearing under policy 6144.36 (Parent Complaint Form) immediately.

2. The Board will order Superintendent Woods to follow Board policy on areas attendance and will transfer the student to the school she should have been attending for the last eighteen months.

3. The Board will expunge from the files the record of teacher Jeffrey and any other teacher all records in this matter and instead will place a letter in Jeffrey, et.al., files with notice of the reason for the absence of those records.

4. The Board will pay the reasonable costs incurred by the Association in preparation for the first Board hearing.

How long has this condition existed? January 15, 1991

Did you perform the order? N/A

Does this affect more than one Unified building? Yes X

Does this affect more than one person? Yes X

The following statement was attached the above grievance:

At the direction of the Superintendent of Schools, Administrator Formative Evaluation K-8 Osimitz informed parents that teachers had agreed to "compromise" in reply to a parent complaint and the Board level hearing was not to take place.

The REA, after a meeting with the representative of the parents, did agree to consult the teachers at Gifford School. After the agreed to consultations the teachers rejected the "proposed" offer of settlement and so informed the building principal and Mr. Osimitz.

The primary reasons for the "rejection" of the settlement was the actions of the Superintendent in refusing to honor the policies of the Board and to protect the staff in the building from parent attack.

Woods made a "deal" with at least one of the parent(s) to leave those children in the school contrary to the way District policy has consistently been implemented and to purge the results of the students.

Further, Woods personally dealt with the parents while teachers and school administration were dealing only with his designee. Woods acted without full information or with disregard for the facts in this case.

Further, this case was set for hearing and then delayed because of a death in the family of the President of the Board. The Association spent considerable funds preparing for the hearing and both the teachers and the Association have a right to a hearing before the Board of Education but Board President Friedel has refused to convene the hearing.

The parents, since the Woods meeting, have "attacked" at least one additional teacher and have encouraged some teachers to attack and discredit teacher Jeffrey and other teachers involved in the "settlement" discussions. Either Woods provided the form in his meeting with parents for these attacks or because of his "lack of knowledge" as to the history and actions of the parents he failed to provide the proper safeguards for the teachers in the building.

8. The three grievances were all signed by James Ennis, the Executive Director of the Racine Education Association since 1973. Ennis is the chief spokesman in contract negotiations and is responsible for processing grievances for the Association. When Ennis files Level Two grievances, he filed them with the chair of the subcommittee of the Board of Education and with the Director of Employee Relations, Frank Johnson.

9. When preparing information for Grievance 58-91, Ennis visited the two elementary schools listed -- Wind Point and Giese. Ennis considered the problem with temperatures in those two schools to be the same, although teachers at Giese were provided an opportunity by the Acting Principal Clarence Bianco to move their work to Starbuck School on January 18, 1991, a day when no students were present.

10. Grievance 48-91 concerns preparation and lunch time for TMH (trainable mentally handicapped) teachers. TMH teachers are assigned to three locations -- Jones Elementary School, Mitchell Middle School and Park High School. In investigating this grievance, Ennis interviewed teachers in those three sites and determined that the dispute involved all of the teachers in the program in all three locations. Building principals are responsible for provided appropriate preparation time and lunch breaks.

11. On January 29, 1991, Johnson sent Ennis the following letter:

> RE: REA Grievances #48-91 and #58-91
>
> It appears the two grievances referenced above should be filed at Level I. Grievance #58-91 should be divided into two separate grievances.
>
> The facts and incidents for each school listed in grievance #58-91 are different, therefore, the grievance should be filed at the building level. In addition, unless you can provide us with a list of the "other affected teachers," the building principal should be given the opportunity to respond to this grievance. Please let me know your opinion on this.

It is the understanding of the Association that building principals cannot make rules to close buildings with unhealthy or unsafe conditions, and that such a policy or decision would have to be made by the district-wide administrator or the Board. The Association relied on Board policies with respect to the job descriptions and duties and authority of building principals in filing the grievances at Level Two. Building principals are responsible for seeing that a heating system in a building is maintained or repaired when necessary.

12. Grievance 55-91 began when a teacher, Holly Jeffrey, at Gifford Elementary School, issued behavior tickets to upper middle class regular education students for misbehavior in the hall outside of her classroom. After parents made a complaint, Jeffrey and the building principal reached a satisfactory understanding on the issue, and the grievance was primarily in response to what the Association saw as the understanding between Jeffrey and the principal being overridden by the Superintendent of Schools or his designee, Administrator Formative Evaluation K-8 Frank Osimitz. The parents who made the complaint also made a complaint against a music teacher who is at Gifford part of his day, and the building administrator. The Association's investigation into this grievance determined that a student involved should have been assigned to North Park Elementary School rather than Gifford. As a remedy, the Association asked the Board to conduct a hearing under a particular

Board policy which is a parent complaint form procedure, and it asked the Board to order the superintendent to follow the Board policy. The Association was also asking that the student be moved to North Park, which would have added one student to a class at North Park and decreased the class at Gifford by one student. The Association determined that the relief it sought in this grievance would have to be granted by the Board. The Association believed that the action taken by the District in this situation had an impact on all teachers in the bargaining unit because of the use of the parent complaint policy. On January 31, 1991, Johnson sent Ennis the following:

> Grievance #55-91: Parent Complaint Procedure
>
> Please review section 9.4 Group/Class Grievance (Level Two) of the teachers' labor agreement. As you know, this section states that grievances filed under the parameters of this section must affect a group or class of teachers in more than one school. It appears this grievance affected a couple of teachers at Gifford School, and therefore, this grievance should be filed at Level One. As you have reminded us several times, we held an inservice in the spring of 1989 encouraging principals and teachers to deal with grievances at the lowest possible levels. If the Level One is continuously circumvented, there is no way for grievances to be resolved at the lowest possible level.
>
> However, I will present the matter to the Grievance Committee and allow them to determine how they wish to proceed.

13. The Board's Grievance Committee met on February 14, 1991. Johnson sent a response to Ennis on February 18, 1991:

> RE: REA Grievances #48-91, #55-91, #58-91
>
> At the Grievance Committee meeting held on February 14, 1991, you presented the Committee a revised agenda. With your agenda, the three grievances referenced above were added to the original agenda. The Committee believes that these grievances should be properly filed at Level One. They are concerned that grievances will not, when possible, be settled at the lowest possible level if the respective principals are continuously circumvented.

14. On June 18, 1991, Ennis requested that the WERC submit to the parties panels of impartial arbitrators for several grievances, including the three at issue here -- 48-91, 55-91, and 58-91. On July 5, 1991, the WERC submitted the panels to Ennis and Johnson. Rather than using the method of alternating strikes of arbitrators as per the labor agreement, Johnson and Association Attorney Robert Weber have a practice whereby Weber will make the first two strikes and telephone Johnson's office with those names, and Johnson then selects an arbitrator from the remaining three names. Johnson refused to select an arbitrator for grievances 48-91, 55-91 and 58-91.

15. On August 9, 1989, the Association filed Grievance 40-89 at Level Two. On August 16, 1989, Katherine Campbell, an Employee Relations Specialist in Johnson's office, wrote Ennis and stated that the grievance should have been filed at Level One as it affected teachers in one school. Ennis replied on August 22, 1989, that the grievance was properly filed. Johnson responded on

August 31, 1989, noting that five grievances, including #40-89, were filed at Level Two and that none of them were proper Level Two grievances in accordance with Section 9.4 of the labor agreement. After an exchange of more letters, the Association notified Johnson on September 19, 1989, that it would resubmit the grievance at Level One as a matter of courtesy, although it continued to maintain that the grievance was appropriately filed at Level Two. The grievance never came back up to Level Two, although Johnson could not determine from his files whether it ever went back to Level One or what happened to it if it were filed there.

16. On October 25, 1989, the Association notified the Board's grievance committee that it was forwarding Grievance 16-90 to it at Level Two. Johnson sent Ennis a letter on November 1, 1989, stating that #16-90 should be filed at Level One. Johnson also noted the following in this letter:

> Jim, I have a growing concern about the number of grievances that you claim are appropriate for Level II submission when Level I would obviously be more appropriate. Potential resolution of these grievances would be peculiar with each of the schools and available options would best be considered by the individual building principal.
>
> As you will recall, not too long ago, the District and the REA sent its front-line contract administrators to a special school designed to reduce and resolve grievance situations at the first level. When grievances are filed at Level II rather than Level I, the potential for resolution at an early stage is eliminated.
>
> . . .

The Association maintained that grievance 16-90 was appropriately filed at Level Two, and on March 5, 1990, the WERC sent Ennis and Johnson panels of arbitrators for several grievances, including #16-90. The Association has not sought to compel the District to take grievance 16-90 to arbitration.

17. During the hearing in the matter, the District amended its Complaint to add the following:

> On December 20, 1991 and December 23, 1991, the Association filed grievances #27-92 and 29-92 respectively. Neither of those grievances involve a group or class of teachers in more than one school. The District notified the Association that the grievances were not Level Two grievances.

On January 2, 1992, Johnson sent Ennis the following letter:

> RE: REA Grievance #27-92: Reprisal (V. Moreno, Horlick)
> REA Grievance #29-92: Post Vacant Coaching Position/Alleged Individual Bargaining
>
> This will acknowledge receipt of the above referenced REA grievances which you have filed at level two.
>
> Section 9.4 requires level two filings to affect a group or class of teachers in more than one school. It does not appear to me that either grievance on its face fits

> this qualification. Therefore, it will be my recommendation that the Grievance Committee return both of these grievances to you for filing at level one.

Please advise if you intend to refile these grievances.

Johnson received no response to his letter.

18. The Association and the District have processed hundreds of grievances. The majority of them were filed at Level One. In April and May of 1989, the Association and the District jointly participated in a program involving grievance handling which was presented by the WERC and the Federal Mediation and Conciliation Service. One of the objectives of the program was to reduce the number of grievances by resolving them at the early stages, and both the Association and District brought many building representatives who would be involved in Level One grievances to the program. In the 1988-89 school year, The Association filed 42 grievances, and 33 of them proceeded to Level Two. In the 1990-91 school year, the Association filed 98 grievances, and 64 of them proceeded to Level Two. The number of teachers employed in the District was about 1,500 for both the 1988-89 year and the 1990-91 year.

19. Johnson reviews all grievances forwarded to Level Two, and if he believes the grievance is not appropriately filed at Level Two, he sends it back to the Association or gives it to the Board's Grievance Committee to determine whether the Committee wants it sent back to the Association. He is not aware of any time that the Committee chose to accept a grievance when he advised it that the grievance did not meet the definition of a Level Two grievance.

Based on the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Respondent Racine Unified School District violated Sec. 111.70(3)(a)5, Stats., by refusing to strike arbitrators for grievances 48-91, 55-91, and 58-91.

2. Respondent Racine Education Association did not violate Sec. 111.70(3)(b)4, Stats, by refusing to file grievances 48-91, 55-91 and 58-91 at Level One and by filing those grievances at Level Two of the grievance procedure, or by filing grievances 40-89, 16-90, 27-92 and 29-92 at Level Two of the grievance procedure.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER 1/

It is hereby ordered that:

1. Respondent Racine Unified School District shall cease and desist from refusing to strike arbitrators for grievances 48-91, 55-91 and 58-91.

(See Footnote 1/ on Page 14)

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

2. Respondent Racine Unified School District shall take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

a. Upon presentation from the Racine Education Association of the names of arbitrators remaining on panels, the Respondent Racine Unified School District shall select arbitrators for grievances 48-91, 55-91 and 58-91 and so notify the Association.

b. Notify the WERC in writing within twenty (20) days following the date of this Order as to what steps it has taken to comply with this Order.

3. The complaint filed by the Racine Unified School District against the Racine Education Association is hereby dismissed in its entirety.

Dated at Madison, Wisconsin this 6th day of August, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Karen J. Mawhinney, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES:

The Association:

The Association asserts that the District has violated MERA in refusing to arbitrate the disputed grievances, and that the District's Sec. 111.70(3)(b)4 charge has not been proven and is at best an arbitrability defense. The Association has no duty to separate grievances that affect a group of teachers in more than one school. Section 9.4 of the collective bargaining agreement explicitly provides that the Association has the option of filing such grievances at Level Two. Grievance 58-91 specifically names two schools alleged to have been affected and refers to teachers at those schools. The Association relied on Section 10.6 for making its claim that the District violated its contractual duties to teachers in Giese and Wind Point Elementary Schools by not maintaining heating systems properly or by making other arrangements for the teachers. The claim is arbitrable on its face and the District has a duty to arbitrate the claim.

The Association contends that grievance 48-91 is similar, and that on its face, the grievance alleged that Secs. 10.4 and 10.4.3 of the labor agreement had been breached, district-wide, adversely affecting all TMH teachers who are based at one of several locations but travel between schools on a regular basis. Regardless of the merits of the District's claim that this grievance or grievance 55-91 should have been filed at Level One instead of Level Two, the threshold issue concerns the District's refusal to proceed to arbitration rather than raising the alleged procedural deficiency as an arbitrability defense.

Even if the District has airtight defenses to arbitrability, the District's refusal to process such disputes to arbitration is a violation of Sec. 111.70(3)(a)5, Stats. The District's procedural objections could have been preserved and raised as an arbitrability defense at the arbitration hearing, but such procedural objections are not grounds for refusing to proceed to arbitration. The issues raised by the District -- such as whether the group or class of teachers was properly identified or whether the dispute involved two or more schools -- might well be appropriate issues for an arbitrator. The issue in this case is whether the District unlawfully refused to arbitrate those and other issues, and the answer is yes.

The Association argues that the District's counter claim has no merit. While the District has raised an additional allegation that there is a pattern or practice by the Association of refusing to file grievances at Level One, the District misconstrues the nature of a pattern of misconduct. The District has relied on two grievances from 1989 in Exhibits 11 and 12, the three grievances which are the subject of the Association's complaint, and two grievances filed in December of 1991, which were filed after the commencement of these proceedings and admitted over the objection of the Association. District Exhibit 11 is an example of the Association's good faith, where the Association agreed to submit a grievance at Level One as a matter of courtesy and a good faith attempt to compromise on the issue, while reserving its right to exercise Section 9.4 options in other cases. District Exhibit 12 is evidence of the District's continuing pattern of bad faith refusal to bargain, as grievance 16-90 is almost identical to grievance 58-91. The Association could have insisted

that the District arbitrate the grievance and filed a prohibited practice charge, but chose not to push the issue at that time. The District has not met its burden of proof with respect to its claim and its complaint should be dismissed.

The District:

The District asserts that the Wisconsin statutes and sound policy considerations require the Commission to take jurisdiction of both the District's and the Association's complaints. Deferral is only appropriate when the complaining party has the right under the labor agreement to bring a grievance before an arbitrator. In Communications Workers of America and C & P Telephone, 280 NLRB 78 (1986), the NLRB affirmed an administrative law judge's holding that when the employer, as the charging party, does not have access to the grievance/arbitration procedure under the contract, deferral to arbitration is not appropriate. As in Communications Workers, the District has no right or obligation to file a grievance or demand arbitration if it believes the Association has violated the contract.

The District contends that even if the three individual grievances were heard by three arbitrators, those arbitrators would not have jurisdiction to award the District's requested remedy. The parties' agreement does not give an arbitrator the right to hear a claim of contract violation brought by the District. Any remedy of such a breach would be limited to the facts of that grievance, and the arbitrator would not have jurisdiction to grant a cease and desist order. Also, the District would be faced with the prospect of contradictory orders from different arbitrators.

Ordering the District to submit its complaint to arbitration would fundamentally alter the parties' agreement on the function of the grievance procedure, the District submits. The Association knowingly filed grievances at the wrong level of the grievance procedure, and this issue is not arbitrable. The WERC is the only forum available to the District, and the District has a statutory right to have its complaint adjudicated in that forum.

The District contends that the Commission should not defer the Association's complaint because sound policy reasons require the Commission to exercise its jurisdiction. The parties have agreed since 1969 that grievances should be resolved at the lowest possible administrative level, and have agreed to language which defines the levels at which grievances shall commence, requiring all grievances to be filed at Level One unless a grievance affects a group or class of teachers in more than one school. The parties' agreement that grievances be resolved at the lowest possible level is a central feature of the grievance procedure. The Association's refusal to comply with the grievance procedure deprives the District of the benefit of its bargain and undermines the purpose of the grievance procedure. Therefore, the Commission should not defer this matter to arbitration, but should follow Milwaukee Board of School Directors, Dec. No. 12028-A (Fleischli, 5/74), where the examiner held that the dispute involved the overall operation of the grievance procedure and centered around a question of interpretation of the agreement that would affect the progression of all grievances.

Where a question affecting the overall function of the grievance procedure is at the center of the dispute, the Commission should interpret the contract. An arbitrator could not resolve the question as it pertains to other similar disputes, but the Commission would be able to settle the issue as to all the grievances. The case at hand is distinguishable from cases where the Commission has found deferral to be appropriate. The cases did not involve a complaint by a party unable to invoke binding arbitration, and employers in

those cases were asserting procedural defense to arbitration. In contrast, the District is seeking redress for its own claimed injury and not seeking just to avoid arbitrating a particular grievance. The District seeks a remedy to restore the integrity of the grievance procedure. The District further argues that fairness and judicial economy dictate that both complaints be resolved in the same forum.

The District submits that the Association has violated the bargaining agreement by refusing to file at Level One grievances which do not affect a group or class of teachers at more than one school. In the parties' first round of negotiations in 1969, the Association tried to but did not get language to file a group grievance if efforts to solve similar types of grievances failed in a number of buildings at Level One. For the past four years, the Association has tried to get the result it sought in 1969 but failed to get, and has ignored the stated definition of a Level Two grievance. The Association has relied on phrases such as "all like affected teachers" to bootstrap all of its grievances to Level Two. While the Association concedes that a Level Two grievance requires an incident involving more than one teacher at more than one school, it chose to file its grievances at Level Two because it believed that the building principals would be unable to resolve the dispute.

Grievance 55-91 involves one or at the most, two teachers at one school, Gifford. The Association apparently believes that because it was asking that a student be transferred to another school, the grievance then affected some unnamed teacher at the school to which the student should be transferred, and that any action taken by the District affects all unit members because it involved language that may some day be applied to one of them. The Association skipped filing the grievance at Level One, because it did not think the building principal would be able to resolve the grievance, which is the common thread weaving all the improperly filed grievances.

Grievance 48-91 alleged that Delaney and like affected teachers lost lunch and planning time, but the Association never identified any of the "like affected teachers." Johnson testified that the Park High School building principal would have been able to remedy the grievance, and there is nothing is the Association's exhibits of the job descriptions of principals that contradicts his testimony. The contract does not give the Association the right to unilaterally determine which grievances a building principal should or could handle.

Grievance 58-91 alleged that the maintenance of facilities section of the contract was violated by the failure of the heating system and Giese, Wind Point and like affected district-wide. Ennis conceded that the failure of a school boiler is a specific instance. Again, the Association's rationale for skipping Level One is the irrelevant and unfounded belief that building principals do not have authority to rectify heating problems. The Association all but admitted that the heating problems were two separate grievances. To ignore this is to allow the Association to file any grievance it chooses at Level Two, and removes the distinction between group or class grievances in the contract.

Grievance 27-92 involves one teacher, Victor Morena, and one school, Horlick High School. Grievance 29-92 involves one teacher and one extracurricular position at one school. The Association introduced no evidence to dispute the District's allegation that these grievances should be filed at Level One.

In conclusion, the District contends that the Association has violated

the parties' contract by filing grievances at Level Two when they did not meet the definition of Level Two, and the Association's actions amount to a unilateral change in procedure the parties agreed to in the collective bargaining agreement. If the Association is allowed to use magic words such as "all affected teachers, like affected teachers, and district-wide," it will be allowed to rewrite the labor agreement and obtain through litigation that which it failed to achieve in voluntary bargaining.

The Association's Reply:

The Association responds by stating that the District would have the Examiner overturn all Commission case law with respect to an employer's duty to raise procedural arbitrability defenses at arbitration. The only new theory the District raises for this is based on the Communication Workers case, which did not involve an arbitrability defense within the jurisdiction of an arbitrator, but involved an issue which the employer had no other way to address. The Association finds this case not even remotely applicable.

The Association notes that each arbitrator would have the authority and jurisdiction to hear the District's claim that the Association had not followed the proper filing procedure, as a threshold issue of arbitrability. Neither the Commission nor an arbitrator could issue a cease and desist order of the type requested by the District, which would require filing all grievances at Level One, as each grievance must be determined to have been filed at the appropriate level or not. Further, contradictory rulings by different arbitrators on the same subject matter is hardly a new argument. The District's sole contention is that the grievances at issue were filed at the wrong level, and this is nothing more than an arbitrability defense.

The Association submits that the District's own statistics disprove its contention that the Association has a pattern of conduct circumventing the lowest level of the grievance procedure. Johnson testified that in the 1988-89 school year, 42 grievances were filed at Level One and 33 of them were advanced to Level Two. In 1990-91, 98 grievances were filed at Level One and 64 were processed to Level Two. The Association has clearly used Level One on a majority of occasions.

While the District argues the merits of its arbitrability defense in detail, it ignores the dispositive fact that grievances 58-91, 48-91 and 55-91 comes within the ambit of Level Two filings on their faces as they allege a violation of the labor agreement affecting a group or class of teachers at more than one school. The merits of the allegations must be determined by an arbitrator. The District maintains that its arbitrability defenses are certain to prevail, relying on testimony adduced at the prohibited practice hearing, concerning the underlying nature of the grievances -- testimonial, pre-arbitration evidence which should not even have been subject to discovery if the District arbitrated the matter as it should have done. If the Commission fails to defer the District's complaint to arbitration, this is the Pandora's box it would be opening. It is the District that is violating the integrity of the grievance process by refusing to follow it were the allegations are sufficient to establish a right of a Level Two filing. The Commission has stated that even if the outcome of proceeding to arbitration is clear as argued by an employer, a union's pursuit of arbitration does not violate state laws.

The District's Reply:

The District responds to the Association's argument that it is not necessarily beneficial to resolve matters at the lowest administrative level by noting that the Association is required to file grievances at Level One, unless

it meets the definition of Section 9.4, and the Association's proffered policy reason for skipping Level One is irrelevant.

While the Association suggests that the District appears to argue that each teacher in a building would have to file a grievance over a heating failure, that is incorrect. Under Section 9.3.1.2, the Association may file one grievance at Level One with the building principal or appropriate assistant superintendent if a grievance affects a group or class of teachers in that school.

The Association's arguments do not address the District's right to have its complaint heard. The District's complaint is based on the Association's actions in commencing various grievances at the wrong level of the grievance procedure, after the District put the Association on notice that such a practice violated the parties' agreement and therefore Sec. 111.70(3)(b)4, Stats. The examiner must decide the merits of the District's complaint that the Association's actions violate the parties' contract.

The Association's claim that the District could have raised its claim at the arbitration hearing ignores the fact that its conduct would require the District to raise the same issue over and over at each arbitration hearing concerning a misfiled grievance. The Association cites no authority for its assertion that the seven instances in the record where it misfiled grievances do not establish a pattern. The Association also ignores the fact that the District has never arbitrated any grievance which it identified as being erroneously filed at Level Two. Finally, the Association cites no authority which supports its position that the Commission should defer the District's complaint to arbitration.

DISCUSSION:

When confronted with questions of arbitrability, the Commission has long relied on the well-settled law enunciated by the U.S. Supreme Court in the Steelworkers trilogy 2/ and applied to the Municipal Employment Relations Act by the Wisconsin Supreme Court, 3/ where the Court ruled that arbitration will be ordered unless it can be said with positive assurance the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. The Commission has consistently held that a party has a right to proceed to arbitration when it makes a claim which on its face is governed by the collective bargaining agreement. 4/

The District has not cited any provision of the bargaining agreement which would exclude the grievances in dispute from arbitration. The District has only objected to the grievances being filed at Level Two instead of Level One. This is a classic procedural arbitrability question and is clearly one for the arbitrators. The point need not be belabored -- the District's refusal to proceed to arbitration violates Sec. 111.70(3)(a)5, and it must proceed to arbitration with grievances 48-91, 55-91 and 58-91.

2/ United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

3/ Jt. School District No. 10 v. Jefferson Education Ass'n., 78 Wis.2d 94 (1977).

4/ State of Wisconsin, Dec. No. 18012-C (WERC, 11/81),

The District has complained that the Association is continuously violating the bargaining agreement by filing grievances at Level Two when they should be filed at Level One. The District attempts to force the Examiner to look at the merits of the procedural arbitrability defense in order to rule on its complaint. The determination of whether the grievances cited by the District were properly filed at Level Two is a matter for the arbitrators. In Milwaukee Board of School Directors, 5/ the Examiner found an exception to the Commission's deferral policy where the dispute had caused a breakdown in the grievance procedure itself. In this case, there is no need to carve out a similar exception, because the District has failed to conclusively demonstrate that there is a breakdown in the grievance procedure or that the Association's conduct has fundamentally altered the grievance procedure in a manner to warrant such an exception. The Association has filed hundreds of grievances, many of them at Level One. The Association has on occasion acquiesced with the District's demand that it resubmit a grievance to Level One when it was originally filed at Level Two. The District is not without a remedy, if indeed it is correct that certain grievances were improperly filed at the wrong step. It has not waived any defenses available to it in arbitration.

The Examiner has considered all the arguments of the parties, and finds that the District's refusal to submit grievances 48-91, 55-91 and 58-91 to arbitration violates Sec. 111.70(3)(a)5, and that the District's complaint is without merit, inasmuch as it would be inappropriate for the Examiner to determine whether the three grievances named above as well as four others cited by the District were filed at the correct level or not. The policy reasons raised by the District have been rejected, as the better policy is for the arbitration process to be allowed to work. Accordingly, the Examiner has ordered the District to strike arbitrators for grievances 48-91, 55-91 and 58-91 and has dismissed the District's complaint.

Dated at Madison, Wisconsin this 6th day of August, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Karen J. Mawhinney, Examiner

5/ Dec. No. 12028-A (Fleischli, 5/74), aff'd by operation of law, Dec. No. 12028-B (WERC, 9/74).